IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CITY OF COLUMBUS, MISSISSIPPI,
UTILITIES COMMISSION, PLAINTIFF,

VERSUS CIVIL ACTION NO. 1:94CV296-S-D

OMNI CONSTRUCTION, INC. and
CHARLES HUDNALL, CONSULTING
ENGINEER, P.A., DEFENDANTS.

MEMORANDUM DENYING MOTION
TO DISMISS AND REMANDING TO STATE COURT

This cause was originally filed as a declaratory judgment action in Lowndes County Chancery Court, but was removed by Omni Construction, Inc. to this court. The cause is before the court on Omni's motion to dismiss Charles Hudnall, Consulting Engineer, P.A. (hereinafter referred to as "Hudnall"). Omni alleges that Hudnall was sued in order to defeat diversity between the plaintiff and Omni. The plaintiff has filed a motion to remand. When answering the complaint, Omni filed a counterclaim against the City of Columbus.

Facts

The plaintiff had contracted with Hudnall to engineer the Highway 69 South Sanitary Sewer Project. The parties agree that the plaintiff and Hudnall are Mississippi citizens. Hudnall was to be an independent contractor. The contract between the plaintiff and Hudnall contains an indemnity provision which would require Hudnall to indemnify the plaintiff for any cost over-runs which are attributable to any deficiency in the engineering specifications of

the project. Omni was the successful bidder on the project. Plaintiff and Omni entered into a construction contract for the project.

Disputes exist between the plaintiff and Omni concerning (1) the amount of money due Omni by the Commission under the contract; (2) the plaintiff's right to collect liquidated damages from Omni; and (3) Omni's right to additional compensation and damages from the plaintiff for alleged differing site conditions, changes, and breach of contract. The original complaint makes no specific claim for relief from Hudnall. In the counterclaim, Omni alleges that many of the project cost over-runs were due to incorrect engineering specifications. In essence, Omni alleges that the City of Columbus owes it for excessive cost due to Hudnall's engineering of the construction project. Of course, this exactly is why the plaintiff sued Hudnall, alleging him to be a necessary party.

Discussion

The law on the issue of fraudulent joinder is well established:

> The burden of persuasion placed upon those who cry "fraudulent joinder" is indeed a heavy one. In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981). The court has reviewed not only plaintiff's state court pleading but also defendants' answer, the extensive argument of counsel, and

the pertinent state case law, see Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1990) (for purposes of resolving fraudulent joinder questions, court may pierce pleadings), and concludes that there has been no fraudulent joinder of Hudnall.

Although technically the issue, after having been removed to this court, is whether Hudnall was fraudulently joined in order to defect diversity; practically speaking, it boils down to whether Hudnall is an indispensable party. A party shall be joined as a party in an action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Rule 19(a) Fed.R.Civ.P. "If a person as described in subdivision (a)(1)-(2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Rule 19(b) of the Fed.R.Civ.P. Rule 19(b) continues by stating four factors relevant to the determination whether a party is indispensable:

> (1) to what extent a judgment rendered in the party's absence might be prejudicial to that party or others in the lawsuit; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the party cannot be joined.

The court finds that Hudnall satisfies the requisites in both Rule 19(a) and (b).

The Circuit Court of Appeals for the Fifth Circuit in Bankston v. Burch, 27 F.3d 164 (5th Cir. 1994), states:

> The inquiry into the existence of complete diversity requires considering the citizenship even of absent indispensable parties. The parties may not manufacture diversity jurisdiction by failing to join a nondiverse indispensable party.

Id. 27 F.3d at 168; see also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3606. Just as a plaintiff may not avoid suing a nondiverse indispensable defendant in order to get into federal court, a diverse defendant may not have dismissed an indispensable nondiverse co-defendant in order to stay in federal court. The plaintiff's complaint alleges the bare minimum against Hudnall. But it would be ridiculous to dismiss him as a fraudulently joined party, and then turn around and dismiss the entire cause because Hudnall is an indispensable party which if joined would defeat diversity. Omni's answer inextricably ties Hudnall to this cause of action.[1]

---

[1]The following are excerpts from Omni's counterclaim:

> 7. Because the Engineer underestimated the amount needed and the Commission added work to the contract, the final quantity of Bituminous Resurfacing needed and used on the Project was 4,870 square yards.
>
> 8. As a result of an underestimation by the City's Engineer, the differing site conditions experienced on the Project, and other matters beyond Omni's control, the quantity of Washed Gravel Bedding increased to 4,752 cubic yards.
>
> 10. Said increase occurred because of underestimation or miscalculation by the Engineer, and not because of any fault of Omni.

This court is of the opinion that "evaluat[ing] all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff," B., Inc., 663 F.2d at 549, and "resolv[ing] any uncertainties as to the current state of controlling substantive law in favor of the plaintiff," id., there is a possibility that plaintiff will "be able to establish a cause of action against the in-state defendant in state court...." Id. Consequently, as no diversity exists between the parties, this court lacks jurisdiction over this cause, and remand to state court is mandated.

An order in accordance with this memorandum opinion shall be issued.

This the _____ day of September, 1995.

_____
CHIEF JUDGE

These excerpts, in conjunction with the indemnity clause between the plaintiff and Hudnall, demonstrate that Hudnall was not fraudulently joined.